HOO SEE SEN & ANOR.

v.

PUBLIC BANK BHD. & ANOR.

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
ABDUL HAMID CJ (MALAYA)
LEE HUN HOE CJ (BORNEO)
[CIVIL APPEAL NO. 335 OF 1987]
17 MARCH 1988

CONTRACT: *Assignment - Deed of assignment - Vendor & bank (financier) - Assignment on behalf of purchaser - Duty of assignee.*

CONTRACT: *Sale and purchase of land - Title not issued - Assignment by vendor of S & P to bank (financier) - Duties and rights of assignee, purchaser, vendor - Late delivery - Right to withhold balance of purchase price against claim.*

CONTRACT: *Late Delivery - Property not built - Claim for late delivery compensation as per S & P - To offset balance of loan payable to vendor - Injunction to restrain assignee from releasing balance of monies to purchaser.*

CONTRACT: *Injunction - Brought to restrain assignee from releasing balance monies to vendor - Claim for late delivery to offset amounts owed to vendor.*

The appellants entered into a sale & purchase agreement on 18 July 1982 with the second respondent for property upon which a two storey link house was to be built. The agreement contained a late delivery clause - vacant possession was to be given on 17 July 1984 (24 months).

The appellants obtained financing from the First respondent and as security assigned the benefits under the Sale and Purchase Agreement to the First respondent. The First respondent provided an undertaking to the vendor/second respondent that it would pay any monies due under the Sale and Purchase.

The vendor/2nd respondent did not manage to deliver vacant possession by 24 July 1984 and the appellants. The appellants claimed for the said compensation.

As the liquidated damages claimed exceeded the amount of the balance purchase price, the appellants applied for an injunction to restrain the 1st respondent from paying the balance purchase price over to the vendor/second respondent.

Held:

[1] The first respondent acting as agent for the appellants is holding the loan sum on behalf of the appellants and is bound to release the money only when authorised to do so, and this must be for the benefit of the appellants.

[2] The first respondent is therefore injuncted from releasing any balance loan sum to the second respondent as the appellant had not authorised such release.

[Appeal allowed.]

For the appellants - Ngeow Yin Ngee; M/s. Ngeow & Maurice Gomes
For the 1st respondent - Suhendran Sockanathan; M/s. Chooi & Co
For the 2nd respondent - Patrick Chen; M/s. Allen & Gledhill

JUDGMENT

Salleh Abas LP:

In this case the appellants/plaintiffs sued Public Bank Berhad, the first respondent, for an injunction to restrain it from paying Sedaya Sdn. Bhd., the 2nd respondent, a certain sum of money due from the appellant to the 2nd respondent on the ground that a greater sum was due from the 2nd respondent to the appellant. Both sums arose out of a sale and purchase agreement of a house, the first sum being the balance of the purchase price whilst the second was an amount of liquidated damages for late delivery of vacant possession. The Court below refused to issue the injunction requested for.

The facts of this case are set out in the affidavit of the appellants sworn on 8 May 1987. These are as follows:

The appellants purchased a two-storey link house which was to be constructed by the 2nd respondent for RM145,000. For this purpose the appellants and the 2nd respondent entered into a sale and purchase agreement on 18 August 1982 by paying a booking fee of RM1,000 subject to various payments including progress payments. According to Clause 18 of the sale and purchase agreement, which was only signed on 18 March 1983, the building was to be so constructed that the 2nd respondent had to give vacant possession within 24 months of the date of the agreement i.e. 24 months from the date of payment of the booking fee (18 August 1982). This means that by 17 August, 1984, vacant possession should have been handed over to the appellants, but on that date the building was still uncompleted and no such delivery has taken place. Under the same clause the vendor has to pay liquidated damages at the rate of 10% per annum and these damages had been calculated to amount RM36,309.58 as at 17 February 1987. Under the same clause and 2nd respondent "shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of 10% per annum of the purchase price." It is therefore clear that the payment of liquidated damages is due every day from 17 February 1987.

To finance the project the appellants obtained a loan of RM100,000 from the 1st respondent and assigned the benefits under the sale and purchase agreement to the respondent as security for the loan, because no separate title has yet been issued. The property purchased is still a building lot under an approved layout plan. After taking the assignment the 1st respondent gave an undertaking to the vendor, i.e. the 2nd respondent that it would pay any monies due under the sale and purchase agreement. The amount of such money being due in this case is RM29,000, of which RM21,750 is to be paid upon the delivery of vacant possession; the remainder, being the retention amount, has to be paid as follows: i.e. RM3,625 at the expiry of six months and another RM3,625 at the expiry of twelve months, after the handing over of vacant possession.

It is the contention of the appellants that, since the liquidated damages which the 2nd respondent has to pay to them exceeds the amount of balance of the purchase price for the house payable by them to the 2nd respondent, they are no longer bound to pay any money to the 2nd respondent but instead entitled to the difference. Thus they sued the 1st respondent for an injunction to prevent the 1st respondent from paying the balance in the purchase price over to the 2nd respondent.

The 1st respondent on the other hand said that they cannot agree to the injunction or to the request of the appellants because it would mean that they will be committing a breach of their undertaking which they have given to the 2nd respondent. But the appellants contended that the 1st respondent's undertaking was not a valid undertaking.

In our view this matter could be resolved by looking at the deed of assignment executed between the appellants and the 1st respondent on 7 November 1983. This deed is a very long one, mostly dealing with the rights and obligations regarding the payment of the loan and the management of the property between the appellants and the 1st respondent. There is not a single clause which deals specifically with the disbursement of the loan. There is nothing in the deed of assignment which either authorised or imposed an obligation on the 1st respondent to give an undertaking to the 2nd respondent to pay any money due from the appellants to the 2nd respondent. The only clause which dealt with this is clause No. 1, which says "in consideration of the loan of the sum of Ringgit One Hundred Thousand (RM100,000) .... to be paid or advanced **for the benefits of the Borrowers** (the appellants) by the Bank (the 1st respondent) to the Company (the 2nd respondent) (the payment whereof the Borrowers **expressly authorise** the Bank to make) the Borrowers hereby agree covenant and undertake ..." It must be noted, however, that the authority of the 1st respondent to disburse the loan to the 2nd respondent is "for the benefit of the appellants." Thus payment of the balance of the purchase price to the 2nd respondent when the latter is under an immediate obligation to pay a bigger sum of money to the appellants, cannot under any circumstances be held "for the benefit of the appellants."

We also observe that Clause 4 of the deed of assignment clearly spells out what has been assigned and what has not been assigned. For the sake of clarity we set out below the wording of this clause; which is as follows:

> 4. For the consideration aforesaid the Borrowers as beneficial owners hereby absolutely assign to the Bank the said Property and the full and entire benefit of the Sale Agreement together with all rights title and interests of the Borrowers therein. Provided always that notwithstanding the Assignment hereinbefore contained or any other provision of this Agreement the Borrowers shall and hereby undertake to continue to observe perform and be bound by all whatsoever conditions covenants and stipulations therein on the part of the Borrowers expressed and contained in the Sale Agreement.

It is clear from this clause that the appellants assigned to the 1st respondent only the rights regarding the property and the appellants' rights under the sale and purchase agreement. Because of this the appellants are still bound and continued to be bound to observe and perform all the duties and liabilities under the sale and purchase agreement. Payment of the balance of the purchase price, which are purportedly due from the appellants, is such liability, which is not the liability of the 1st respondent, but the liability of the appellants. Thus, under no circumstances, the 1st respondent was bound or even authorised to make such payment and indeed the position of the 1st respondent in the matter of disbursing the loan is in the capacity of an agent to the appellants. The 1st respondent is holding the loan sum on behalf of the appellants and is bound to release the money only when authorised to do so, and this must be for the benefit of the appellants.

In view of what we have set out earlier, we think that this appeal should be allowed and the interim injunction prayed for by the appellants' summons in chambers dated 8 May 1987 should be issued. We order also that the costs of this appeal and the proceedings in the Court below should be paid by both the respondents and we direct that the deposit of this appeal be refunded to the appellants.

Also found at [1988] 1 CLJ 768